

NORMAN A BARRON. Of St Mag Strans

STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE

820 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

TELEP-ONE. (302) 571-2485

LEGAL MEMORANDUM 81-35

TO:

ALL JUSTICES OF THE PEACE

STATE OF DELAWARE

FROM:

NORMAN A. BARRON

CHIEF MAGISTRATE

DATE:

JANUARY 28, 1981

EE:

BUSINESS RECORDS AS AN EXCEPTION TO THE HEARSAY RULE

Rule 803(6) of the Delaware Uniform Rules Of Evidence

(D.R.E.) states as follows:

"Rule 803. HEARSAY EXCEPTIONS;

AVAILABILITY OF DECLARANT IMMATERIAL.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

(6) Records Of Regularly Conducted Activity.

A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data

compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, assocation, profession, occupation and calling of every kind, whether or not conducted for profit."

Rule 803(6) supercedes 10 $\underline{\text{Del.C.}}$, §4309¹ and should be cited in lieu thereof. The Comment on Rule 803 suggests that §4309 of Title 10 should be repealed².

The reason for the business records exception to the hearsay rule is that regular entries constituting business records and otherwise conforming to the safeguards set out in Rule 803(6) or in 10 Del.C., §4309(a), are said to be so stamped with the reasonable guarantee of trustworthiness as to justify their admission in evidence as an exception to the hearsay rule. Watts v. Delaware Coach Co., Del.Super., 58 A.2d 689 (1948). It has been said that the purpose of the business records exception to

¹⁰ Del.C., §4309(a) states as follows: "(a) The term "business" includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not. A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of [the] act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

This is in keeping with the scope of the Delaware Uniform Rules of Evidence. See Rule 101 and Rule 1101 of the D.R.E..

the hearsay rule is to permit the introduction into evidence of reports in substitution for the actual testimony in court of the persons making those reports. Shultz v. Corning Glass Works, 319 F.Supp. 1161 (D.C.N.Y. 1970), supplemented 330 F.Supp. 46, modified on other grounds 474 F.2d 226 (2d Cir. 1973), affirmed 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974).

Regularly kept records of businesses are admissible in evidence even though the custodian or other qualified witness connected with the business and through whom the records are being offered has no personal knowledge of the recroded facts, or in fact made them. If the record was made at or near the time of the event, and if the record is one which is kept in the ordinary course of the business and if it is the regular practice of the business to keep such a record, all as shown by the custodian or other qualified witness, then it is admissible, unless the source of information or the method of circumstances of preparation indicate a lack of trustworthiness. Miller v. State, Del.Supr., 224 A.2d 592 (1966). Under Rule 803(6), the one who makes the actual record entry need not have knowledge of the event so long as the information placed in the record was transmitted by one with such knowledge. United States v. Burruss, 418 F.2d 677 (4th Cir. 1969). The circumstances of making a record, including the lack of knowledge of the event on the part of the entrant or maker, may affect its weight but they do not affect its admissibility under Rule 803(6). Woodring v. United States, 376 F.2d 619 (10th Cir. 1967), cert. den. 389 U.S. 885, 88 S.Ct. 153, 19 L.Ed.2d 182 (1967).

Although a police department is not a "business" in the ordinary sense of the word, it is in the "business" of law enforcement. Therefore, the records kept in connection with such enforcement are "business records". Johnson v. State, Del.Supr., 253 A.2d 206 (1969). Let's take the case of a person charged with Driving under the Influence of Intoxicating Liquor in violation of 21 Del.C., §4177(a). After his arrest, he consents to have his breath analyzed by means of the CMI Intoxilizer3. The test is performed. At trial, the State, as part of the foundation which must be laid in order to have the actual test result introduced, must first show by satisfactory proof that the Intoxilizer operated properly both before and after the test was conducted. For this purpose, the State wants to introduce the log book which contains the State Chemist's calibration tests conducted both before and after the date on which the actual test was conducted. The State Chemist is not at Court. The police officer who conducted the actual test on the defendant comes to Court with the log book. What follows is the normal manner by which the log book and its relevant entries are introduced into evidence. reliance being made on Rule 803(6) of the D.R.E:

³In the case of State v. Mullen, Del.Super., IN80-07-0400, unreported decision by Judge Joseph T. Walsh dated October 15, 1980, Judge Walsh ruled that the CMI Intoxilizer is a reasonably accurate and reliable device for the measurement of blood alcohol concentration by breath sample, provided the manufacturer's instructions are followed and the operator is qualified.

⁴Of course, there are other means by which the necessary foundation may be laid before the Court. So long as the Court is satisfied that the prerequisites for admissibility under the business records exception to the hearsay rule have been met, through the testimony of the custodian or other qualified witness, then the record may be admitted over objection.

STATE'S EVIDENCE

Benjamin Nefosky

Benjamin Nefosky, called as a witness on the part and behalf of the State, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

Ey Prosecutor:

- Q Okay. Now, did the defendant agree to give a breath sample to the intoxilizer?
 - A Yes. He voluntarily submitted to the breath test 5 .
 - Q Okay. Trooper Nefosky.

Prosecutor: May I have this marked for identification, please? (Log book marked State's Exhibit A for identification.)

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Ey Prosecutor:

- Q Trocper Nefosky, I want to hand you what's been marked as State's for Identification A and ask you if you can identify that?
- A Yes, I can. This is the calibration log for the Intoxilizer which is at Penny Hill, Intoxilizer number 27102088.
 - Q And what do those numbers mean?
 - A That's the identifying numbers for the machine.

The officer has already testified as to having given the defendant the information needed to be given to him under the Implied Consent Law (21 Del.C., §2740 et seq.) See Question 5 of Legal Memorandum 80-8, dated July 22, 1980.

- Q How many machines are at Troop 1?
- A One.
- Q Do you know what type it is?
- A It's a C.M.I. Intoxilizer, model 4011AS.
- Q Okay. And that book is kept at Troop 1?
- A That's correct.
- Q Is it kept in any particular location?
- A The traffic lieutenant's office. He has custody of it. I was given custody of it so that I could bring it to Court today.
 - Q Okay. Do you know for what purpose that book is kept?
- A It's a record of calibration checks kept in the ordinary course of the business of law enforcement and is for the Intox-ilizer to make sure it's analyzing all samples correctly.
 - Q Do you know who makes entries into that?
 - A David Sockrider, the State Chemist.
- And what entries are made in the log book, to you knowledge?
- A Approximately once a month, Mr. Sockrider responds to the troop to make certification or calibration checks on the Intoxilizer. At that time, he conducts three tests. He has three known samples of simulated blood alcohol concentration levels. One is supposed to simulate a point zero-five reading; a second is supposed to simulate a point one-zero reading; and the third is supposed to simulate a negative reading, a complete negative sample; and he runs each test and certifies and duplicates his findings in the log book. That is standard practice.

- O To the best of your knowledge, are those entries made in there at or about the time that Mr. Sockrider conducts his calibration tests?
- The tests were run and immediately the results are logged.
- Q Okay. Would you please open that book to the dates surrounding July 15th or any tests around that date?

By Defense Counsel:

Your Honor, I'm going to object to him testifying what's in that log, unless there's a foundation and unless the officer was present when Mr. Sockrider performs the tests and records the results. I submit that this is hearsay, him testifying from that log as to what Mr. Sockrider did.

By Prosecutor:

Your Honor, I think under Best v. State⁶, and other Delaware case law, and under Rule 803(6) of the Delaware Rules of Evidence or under section 4309 of Title 10, this and similar logs would qualify as business records.

Court held that the business records exception to the hearsay rule was applicable so that it was not error to submit in evidence documents showing that the Intoxilizer had been checked by the State Chemist, even though the State Chemist was not available at trial. The Best case is discussed under Question No. 12 of Legal Memorandum 80-8, dated July 22, 1980.

By Court:

I consider this log as a business record. Our Supreme Court has indicated the police qualify under the business records 7 .

This witness has laid a sufficient foundation.

Ey Prosecutor:

The State would move into evidence what is marked State's for Identification A. (Log book introduced and marked State's Exhibit No. 1.)

By Prosecutor:

- Q Have you turned to those pages surrounding July 15⁸?
- A Yes, I have.
- Q. What is the date preceding July 15th?
- A July 3rd of 1980.
- O Okay. And were any -- what entries are made on July 3rd?
- A At 0822 hours on July 3rd, Mr. Sockrider conducted tests with a known solution to be point zero-five percent blood alcohol. The reading was point zero-four. That test was conducted twice and each time it was point zero-four. There is also an entry with a negative sample which shows negative.
 - Q Do you know if the C.M.I. Intoxilizer has any plus or minus error built into it?

⁷johnson v. State, Del.Supr., 253 A.2d 206 (1969).

 $^{^{8}}$ The test was administered to the defendant on July 15, 1980.

- Yes, it does. It's plus or minus point zero-one, either way.
- Q So, in other words, those results were within that plus or minus?
- A Yes sir. They were accurate within the manufacturer's standards.
- Q Okay. What -- is there any entry subsequent to July 15th?
 - A There was also a test run on July 21st of this year.
 - And who performed those tests?
 - A David Sockrider.
 - Q And what were the results of those tests?
- He had a point zero-five solution, a point zero-one solution and a known negative solution. The results were point zero-four for the point zero-five solution, point zero-nine for the point one-zero solution, and negative for the negative solution.
 - Troop 1 was operating properly before July 15 and after July 15th?
 - A That's correct. Mr. Sockrider did sign them that they were, and the duplicate evidence cards are attached.

The above trial testimony was taken, after minor editing, from the case of <u>State v. Mullen</u>, <u>supra</u>. Note that the police

officer was not the custodian of the log book. Nevertheless, because he was able to state (1) that the log book was kept in the ordinary course of business; (2) that the entries made in the log were entered at or about the time of the calibration checks; and (3) that it was regular practice to keep such records, the Court admitted the log book as a business record. By implication, the Court found the police officer to be an "other qualified witness" through whom such evidence could be admitted.

The Trial Court has broad discretion in determining admissibility of reports, memoranda and records as business records and its ruling with respect thereto will not be disturbed unless that discretion has been abused. <u>Johnson v. State</u>, <u>supra</u>; <u>United States v. Miller</u>, 500 F.2d 751 (5th Cir. 1974); <u>McDaniel v. United States</u>, 343 F.2d 785 (5th Cir. 1965), cert. den. 382 U.S. 826, 86 S.Ct. 59, 15 L.Ed.2d 71 (1965).

Many different types of records have qualified under the business records exception to the hearsay rule. Such records include: accident reports, Magee v. McNany, 95 F.Supp. 675 (D.C.Pa. 1951); bank records, United States v. Currier, 454 F.2d 835 (1st Cir. 1972); cargo records, United States v. Padilla, 457 F.2d 1403 (9th Cir. 1972); checks, United States v. Palmiotti, 254 F.2d 491 (2d Cir. 1958); contracts, Earle Restaurant v. O'Meara, 160 F.2d 257 (D.C.Cir. 1947); credit reports, United States v. DeFrisco, 441 F.2d 137 (5th Cir. 1971); debt records, Southern Glass & Builders Supply Co. v. United States, 398 F.2d

109 (5th Cir. 1968); doctors records, Willmore v. Hertz Corp., 437 F.2d 357 (6th Cir. 1971); hospital records, Henson v. State, Del.Supr., 332 A.2d 773 (1975); laboratory reports, Government of Virgin Islands v. St. Ange, 458 F.2d 981 (3d Cir. 1972); hotel records, United States v. Greiser, 502 F.2d 1295 (9th Cir. 1974); insurance records, State Farm Mut. Auto. Ins. Co. v. West, 149 F.Supp. 289 (D.C.Md. 1957); ledger sheets, Orndorff v. Cohen, D.C.Munn.App., 62 A.2d 794 (1948); log entries, Wilson v. United States, 352 F.2d. 889 (8th Cir. 1965), cert. den. 383 U.S. 944, 36 S.Ct. 1199, 16 L.Ed.2d 207 (1966); payroll records, Williams v. National Sur. Corp., 257 F.2d 771 (5th Cir. 1958); sales records, Southard v. United States, 218 F.2d 943 (9th Cir. 1955); telephone records, United States v. Miller, 500 F.2d 751 (5th Cir. 1974); time records, United States v. Mitchell, 417 F.2d 1247 (7th Cir. 1969); transportation records, Rotolo v. United States, 404 F.2d 316 (5th Cir. 1968).

Not mentioned, you, as the Judge, should admit same as a business record under Rule 803(6) when it is shown that the memorandum, report or record, properly identified, was made at or near the time of the event by a person with knowledge or made from information supplied by a person with knowledge and that the memorandum, report or record is one which is kept in the regular course of business, the above showing being made from the testimony, in Court, of the custodian of such a

memorandum, report or record or by another qualified witness. If after this showing, however, you find there to be a lack of trust-worthiness regarding the source of information or the method or circumstances surrounding the preparation of the memorandum, report or record, then the document should not be admitted under the business records exception to the hearsay rule.

If, of course, a party seeks to introduce a memorandum, report or record and there is no objection to its introduction, it should be admitted and given such weight as is appropriate, even if the proper foundation has not been laid. If you want to elicit certain facts pertaining to the document, you may, of course, satisfy yourself by interrogating the witness concerning same. Rule 614 of the D.R.E.; Legal Memorandum 80-1, dated June 24, 1980.

NAB:pm

The Honorable Daniel L. Herrmann The Honorable William Marvel The Honorable Albert J. Stiftel The Honorable Robert H. Wahl The Honorable Robert D. Thompson The Honorable Alfred Fraczkowski The Honorable Richard S. Gebelein The Honorable Lawrence Sullivan The Honorable Richard McMahon, State Prosecutor The Honorable William J. O'Rourke Harold Schmittinger, Esquire, Pres., Delaware State Bar Assoc. Nicholas M. Valiante, Director, NCC Dept. of Public Safety Professor William J. Conner, Delaware Law School Christine M. Harker, Esquire, Criminal Justice Planning Comm. John R. Fisher, Director, Administrative Office of the Courts Law Libraries: New Castle, Kent and Sussex Counties Files



STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE B20 NORTH FRENCH STREET, 11TH FLOCH WILMINGTON, DELAWARE 19801.

NORMAN A BARRON CHIEF MAG STEATE TELEPHONE: (302) 571-2485

LEGAL MEMORANDUM 81-35 (SUPPLEMENT)

TO: ALL JUSTICES OF THE PEACE

STATE OF DELAWARD

FROM: NORMAN A. BARBON

CHIEF MAGISTRATE

DATE: APRIL 27, 1983

BE: BUSINESS RECORDS AS AN EXCEPTION TO THE HEARSAY RULE

Legal Memorandum 81-35, dated January 28, 1981 dealt with the above-referenced matter. This Supplement is meant to correct an erroneous interpretation of the Business Records exception which has occurred more than once in Justice of the Peace Courts in connection with the charge of driving while under the influence of intexticating liquer. The background is presented by way of a hypothetical:

Hypothetical

John Doe is arrested for violating 21 <u>Del.C.</u>, §4177(a). He enters a plea of not guilty. Trial is held in a Justice of the Peace Court. One of the State's witnesses is Officer Smith who conducted the CMI Intoxilizer test of the defendant's breath. He presents the Log Book which contains the State Chemist's calibration results pertaining to the particular intoxilizer device. In laying



the foundation for the admission into evidence of the Log Book allowed by the Business Records exception to the hearsay rule, he testifies that, besides the State Chemist, he and four other qualified police operators of the intoxilizer device have the only keys to a locked drawer located in a desk above which sits the device and in which is located the Log Book. He states that no other police personnel have access to said drawer. He further testifies that the Log Book is withdrawn from the drawer only by the State Chemist when calibration tests are conducted or by the five authorized police officers when the Log Book is needed in connection with a court proceeding. Through cross-examination, it is established that the Log Book is not kept in the Traffic Lieutenant's Office. Defense counsel thereupon moves to suppress the contents of the Log Book from evidence on the ground that the law requires that the Traffic Lieutenant or Troop Captain have custody of the Log Book, and that since this was not the case, the chain of custody of said Log Book is too questionable to allow its contents into evidence. 1

* * * * *

The motion to suppress should be denied. There is no statutory or case law which mandates that the Log Book be kept in

Of course, the granting of the motion would cause the chemical test result to be excluded from evidence because a proper foundation for its admission could not be had without evidence of the calibration test.

the Traffic Lieutenant's or Troop Captain's custody as a condition to its admissibility. The fact that the Log Book is often stored in the Traffic Lieutenant's Office, does not mean that when it isn't so stored its reliability as evidence is thereby destroyed.

Rule 803(6) of the DRE states as follows:

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"Rule 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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(6) Records Of Regularly Conducted Activity.

A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the course of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business' as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit." (Emphasis

The fact that the Log Book is kept in a locked drawer within the intoxilizer room of a police station of which access is possible by only five authoried and qualified intoxilizer police operators

added.)

See: State v. Mullen, Del.Super., IN80-07-0400, unreported decision by J. Walsh dated October 15, 1980; State v. Bair, Del.Super., No. 76-06-0380A, unreported decision by J. O'Hara dated September 28, 1976.

as well as by the State Chemist does not show any method or circumstance of preparation which indicates a lack of trustworthiness. In fact, the opposite conclusion is warranted under such facts.

Rule 803(6) does not mandate that there be one and only one custodian of the records. So long as the testifying officer may be classified either as a custodian or other qualified witness, the record may be admitted assuming the other requirements of the rule are met.

* * * * *

An objection to the offered evidence is equally groundless under the contention that the chain of custody of the Log Book is suspect.

The State need not prove beyond all possible doubt the improbability of tampering; it need only prove that there is a reasonable probability that no tampering occurred. If you, as the presiding Justice of the Peace, are satisfied that there is a reasonable probability that no tampering occurred, then the objection should be overruled and the evidence should be admitted.

Tatman v. State, Del.Super., 314 A.2d 417 (1973); Clough v. State, Del.Supr., 295 A.2d 729 (1972). This foundation is normally accomplished if the custodian or other qualified witness can testify as to the standard procedures for the secured storage of the Log Book and that from an examination of the relevant contents thereof no evidence of tampering appears. Clearly the facts as set forth in the hypothetical demonstrate a reasonable means of ensuring the integrity of the Log Book. That the testifying witness may not



be able to account for every link in the Book's chain of custody does not give rise to a presumption of tampering absent any evidence thereof.

NAB:pn

CC: The Honorable Daniel L. Herrmann
The Honorable Grover C. Brown
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Charles M. Oberly, III
Lawrence M. Sullivan, Esquire
Eugene M. Hall, Esquire
E. Norman Veasey, Esquire, Pres., Delaware State Bar Assoc.
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STATE OF DELAWARE

THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 1 ITH FLOOR WILMINGTON, DELAWARE 19801

NORMAN A. BARRON CHIEF MAGISTRATE TELEPHONE: (302) 571-2485

LEGAL MEMORANDUM 81-35 (REVISED)

TO:

ALL JUSTICES OF THE PEACE

STATE OF DELAWARE

FROM:

NORMAN A. BARRON

CHIEF MAGISTRATE

DATE:

OCTOBER 15, 1983

RE:

BUSINESS RECORDS AS AN EXCEPTION TO THE HEARSAY RULE

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states as follows:

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of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit."

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[&]quot;(a) The term 'business' includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not. A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of [the] act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

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enforcement. Therefore, the records kept in connection with such enforcement are "business records". Johnson v. State, Del.Supr., 253 A.2d 206 (1969). Let's take the case of a person charged with Driving under the influence of intoxicating liquor in violation of 21 Del.C., §4177(a). After his arrest, he consents to have his breath analyzed by means of the CMI Intoxilizer. 3 The test is performed. At trial, the State, as part of the foundation which must be laid in order to have the actual test result introduced, must first show by satisfactory proof that the Intoxilizer operated properly both before and after the test was conducted. For this purpose, the State wants to introduce the log book which contains the State Chemist's calibration tests conducted both before and after the date on which the actual test was conducted. The State Chemist is not at Court. The police officer who conducted the actual test on the defendant comes to Court with the log book. What follows is the normal manner by which the log book and its relevant entries are introduced into evidence, reliance being made on Rule 803(6) of the D.R.E.:

In the case of State v. Mullen, Del.Super., IN80-07-0400, unreported decision by Judge Joseph T. Walsh dated October 15, 1980, Judge Walsh ruled that the CMI Intoxilizer is a reasonably accurate and reliable device for the measurement of blood alcohol concentration by breath sample, provided the manufacturer's instructions are followed and the operator is qualified.

⁴Of course, there are other means by which the necessary foundation may be laid before the Court. So long as the Court is satisfied that the prerequisites for admissibility under the business records exception to the hearsay rule have been met, through the testimony of the custodian or other qualified witness, then the record may be admitted over objection.

STATE'S EVIDENCE

Benjamin Nefosky

Benjamin Nefosky, called as a witness on the part and behalf of the State, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Prosecutor:

- Q. Okay. Now, did the defendant agree to give a breath sample to the intoxilizer?
 - A. Yes. He voluntarily submitted to the breath test. 5
- Q. Okay. Trooper Nefosky. May I have this marked for identification, please? (Log book marked State's Exhibit A for identification.)

By Prosecutor:

- Q. Trooper Nefosky, I want to hand you what's been marked as State's for Identification A and ask you if you can identify that?
- A. Yes, I can. This is the calibration log for the Intoxilizer which is at Penny Hill, Intoxilizer number 27102088.
 - Q. And what do those numbers mean?
 - A. That's the identifying numbers for the machine.
 - Q. How many machines are at Troop 1?

Note that under the new DUI law, a chemical test may be administered to a defendant without the necessity of informing him of the penalty of revocation for refusing to submit to the test and thereby invoking the provisions of the Implied Consent Law. See: 21 Del.C., §2742(a).

- A. One.
- O. Do you know what type it is?
- A. It's a CMI Intoxilizer, model 4011AS.
- Q. Okay. And that book is kept at Troop 1?
- A. That's correct.
- Q. Is it kept in any particular location?
- A. The traffic lieutenant's office. He has custody of it. I was given custody of it so that I could bring it to Court today.
 - Q. Okay. Do you know for what purpose that book is kept?
- A. It's a record of calibration checks kept in the ordinary course of the business of law enforcement and is for the intox-ilizer to make sure it's analyzing all samples correctly.
 - Q. Do you know who makes entries into that?
 - A. David Sockrider, the State Chemist.
- Q. And what entries are made in the log book, to your knowledge?
- A. Approximately once a month, Mr. Sockrider responds to the troop to make certification or calibration checks on the Intoxilizer. At that time, he conducts three tests. He has three known samples of simulated blood alcohol concentration levels. One is supposed to simulate a point zero-five reading; a second is supposed to simulate a point one-zero reading; and the third is supposed to simulate a negative reading, a complete negative sample; and he runs each test and certifies and duplicates his findings in the log book. That is standard practice.
- Q. To the best of your knowledge, are those entries made in there at or about the time that Mr. Sockrider conducts his calibration tests?

- A. The tests were run and immediately the results are logged.
- Q. Okay. Would you please open that book to the dates surrounding July 15th or any tests around that date?

By Defense Counsel:

Your Honor, I'm going to object to him testifying what's in that log, unless there's a foundation and unless the officer was present when Mr. Sockrider performs the tests and records the results. I submit that this is hearsay, him testifying from that log as to what Mr. Sockrider did.

By Prosecutor:

Your Honor, I think under <u>Best v. State</u>, ⁶ and other Delaware case law, and under Rule 803(6) of the Delaware Rules of Evidence or under section 4309 of Title 10, this and similar logs would qualify as business records.

By Court:

I consider this log as a business record. Our Supreme Court has indicated the police qualify under the business records exception. 7

In Best v. State, Del.Supr., 328 A.2d 141 (1974), the Supreme Court held that the business records exception to the hearsay rule was applicable so that it was not error to submit in evidence documents showing that the intoxilizer had been checked by the State Chemist, even though the State Chemist was not available at trial. The Best case is discussed under Question 12 of Legal Memorandum 82-100 (Revised), dated October 15, 1983.

⁷ Johnson v. State, Del. Supr., 253 A.2d 206 (1969).

This witness has laid a sufficient foundation.

By Prosecutor:

The State would move into evidence what is marked State's for Identification A. (Log book introduced and marked State's Exhibit No. 1.)

By Prosecutor:

- Q. Have you turned to those pages surrounding July 15?
- A. Yes, I have.
- Q. What is the date preceding July 15th?
- A. July 3rd of 1980.
- Q. Okay. And were any -- what entries are made on July 3rd?
- A. At 0822 hours on July 3rd, Mr. Sockrider conducted tests with a known solution to be point zero-five percent blood alcohol. The reading was point zero-four. That test was conducted twice and each time it was point zero-four. There is also an entry with a negative sample which shows negative.
- Q. Do you know if the CMI Intoxilizer has any plus or minus error built into it?
- A. Yes, it does. It's plus or minus point zero-one, either way.
- Q. So, in other words, those results were within that plus or minus?
- A. Yes sir. They were accurate within the manufacturer's standards.

⁸The test was administered to the defendant on July 15, 1980.

- Q. Okay. What -- is there any entry subsequent to July 15th?
 - A. There was also a test run on July 21st of this year.
 - Q. And who performed those tests?
 - A. David Sockrider.
 - Q. And what were the results of those tests?
- A. He had a point zero-five solution, a point zero-one solution and a known negative solution. The results were point zero-four for the point zero-five solution, point zero-nine for the point one-zero solution, and negative for the negative solution.
- Q. Do those logs indicate that the CMI Intoxilizer at Troop
 1 was operating properly before July 15 and after July 15th?
- A. That's correct. Mr. Sockrider did sign them that they were, and the duplicate evidence cards are attached.

* * * * *

The above trial testimony was taken, after minor editing, from the case of State v. Mullen, supra. Note that the police officer was not the custodian of the log book. Nevertheless, because he was able to state (1) that the log book was kept in the ordinary course of business; (2) that the entries made in the log were entered at or about the time of the calibration checks; and (3) that it was regular practice to keep such records, the Court admitted the log book as a business record. By implication, the Court found the police officer to be an "other qualified witness" through whom such evidence could be admitted.

The Trial Court has broad discretion in determining admissibility of reports, memoranda and records as business records

and its ruling with respect thereto will not be disturbed unless that discretion has been abused. <u>Johnson v. State</u>, <u>supra</u>; <u>United States v. Miller</u>, 500 F.2d 751 (5th Cir. 1974); <u>McDaniel v. United States</u>, 343 F.2d 785 (5th Cir. 1965), cert. den. 382 U.S. 826, 86 S.Ct. 59, 15 L.Ed.2d 71 (1965).

Many different types of records have qualified under the business records exception to the hearsay rule. Such records include: accident reports, Magee v. McNany, 95 F.Supp. 675 (D.C. Pa. 1951); bank records, United States v. Currier, 454 F.2d 835 (1st Cir. 1972); cargo records, United States v. Padilla, 457 F.2d 1403 (9th Cir. 1972); checks, United States v. Palmiotti, 254 F.2d 491 (2d Cir. 1958); contracts, Earle Restaurant v. O'Meara, 160 F.2d 257 (D.C.Cir. 1947); credit reports, United States v. DeFrisco, 441 F.2d 137 (5th Cir. 1971); debt records, Southern Glass & Builders Supply Co. v. United States, 398 F.2d 109 (5th Cir. 1968); doctors records, Willmore v. Hertz Corp., 437 F.2d 357 (6th Cir. 1971); hospital records, Henson v. State, Del.Supr., 332 A.2d 773 (1975); laboratory reports, Government of Virgin Islands v. St. Ange, 458 F.2d 981 (3d Cir. 1972); hotel records, United States v. Greiser, 502 F.2d 1295 (9th Cir. 1974); insurance records, State Farm Mut. Auto. Ins. Co. v. West, 149 F. Supp. 289 (D.C.Md. 1957); ledger sheets, Orndorff v. Cohen, D.C.Munn.App., 62 A.2d 794 (1948); log entries, Wilson v. United States, 352 F.2d 889 (8th Cir. 1965), cert. den. 383 U.S. 944, 86 S.Ct. 1199, 16 L.Ed.2d 207 (1966); payroll records, Williams v. National Sur. Corp., 257 F.2d 771 (5th Cir. 1958); sales records, Southard v. United States, 218 F.2d 943 (9th Cir. 1955); telephone records, United States v. Miller,

500 F.2d 751 (5th Cir. 1974); time records, <u>United States v. Mitchell</u>, 417 F.2d 1247 (7th Cir. 1969); transportation records, <u>Rotolo v. United States</u>, 404 F.2d 316 (5th Cir. 1968).

With the above types of business records and other types not mentioned, you, as the Judge, should admit same as a business record under Rule 803(6) when it is shown that the memorandum, report or record, properly identified, was made at or near the time of the event by a person with knowledge or made from information supplied by a person with knowledge and that the memorandum, report or record is one which is kept in the regular course of business, the above showing being made from the testimony, in Court, of the custodian of such a memorandum, report or record or by another qualified witness. If after this showing, however, you find there to be a lack of trustworthiness regarding the source of information or the method or circumstnaces surrounding the preparation of the memorandum, report or record, then the document should not be admitted under the business records exception to the hearsay rule.

If, of course, a party seeks to introduce a memorandum, report or record and there is no objection to its introduction, it should be admitted and given such weight as is appropriate, even if the proper foundation has not been laid. If you want to elicit certain facts pertaining to the document, you may, of course, satisfy yourself by interrogating the witness concerning same.

Rule 614 of the D.R.E.; Legal Memorandum 80-1, dated June 24, 1980.

NAB:pn

CC: The Honorable Daniel L. Herrmann
The Honorable Grover C. Brown
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Charles M. Oberly, III
Lawrence M. Sullivan, Esquire
Eugene M. Hall, Esquire
Henry N. Herndon, Jr., Esquire, Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
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STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

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LEGAL MEMORANDUM 81-35 (REVISED SUPPLEMENT)

TO:

NORMAN A. BARRON CHIEF MAGISTRATE

ALL JUSTICES OF THE PEACE

STATE OF DELAWABET

FROM:

BARRO

CHIEF MAGISTRATE

DATE: OCTOBER 15, 1983

RE:

BUSINESS RECORDS AS AN EXCEPTION TO THE HEARSAY RULE

Legal Memorandum 81-35 (Revised), dated October 15, 1983, dealt with the above-referenced matter. This Supplement is meant to correct an erroneous interpretation of the Business Records exception which has occurred more than once in Justice of the Peace Courts in connection with the charge of driving while under the influence of intoxicating liquor. The background is presented by way of a hypothetical:

Hypothetical

John Doe is arrested for violating 21 Del.C., §4177(a). He enters a plea of not guilty. Trial is held in a Justice of the Peace Court. One of the State's witnesses is Officer Smith who conducted the CMI Intoxilizer test of the defendant's breath. He presents the log book which contains the State Chemist's calibration results pertaining to the particular intoxilizer device. In laying

the foundation for the admission into evidence of the log book allowed by the Business Records exception to the hearsay rule, he testifies that, besides the State Chemist, he and four other qualified police operators of the intoxilizer device have the only keys to a locked drawer located in a desk above which sits the device and in which is located the log book. He states that no other police personnel have access to said drawer. He further testifies that the log book is withdrawn from the drawer only by the State Chemist when calibration tests are conducted or by the five authorized police officers when the log book is needed in connection with a court proceeding. Through cross-examination, it is established that the log book is not kept in the Traffic Lieutenant's Office. Defense counsel thereupon moves to suppress the contents of the log book from evidence on the ground that the law requires that the Traffic Lieutenant or Troop Captain have custody of the log book, and that since this was not the case, the chain of custody of said log book is too questionable to allow its contents into evidence.

* * * * *

The motion to suppress should be denied. There is no statutory or case law which mandates that the log book be kept in the Traffic Lieutenant's or Troop Captain's custody as a condition to its admissibility. The fact that the log book is often stored

Of course, the granting of the motion would cause the chemical test result to be excluded from evidence because a proper foundation for its admission could not be had without evidence of the calibration test.

in the Traffic Lieutenant's Office, 2 does not mean that when it isn't so stored its reliability as evidence is thereby destroyed.

Rule 803(6) of the DRE states as follows:

"Rule 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * * * *

J.

(6) Records Of Regularly Conducted Activity. A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit." (Emphasis added.)

The fact that the log book is kept in a locked drawer within the intoxilizer room of a police station of which access is possible by only five authorized and qualified intoxilizer police operators as well as by the State Chemist does not show any method or circum-

²See: State v. Mullen, Del.Super., IN80-07-0400, unreported decision by J. Walsh dated October 15, 1980; State v. Bair, Del.Super., No. 76-06-0380A, unreported decision by J. O'Hara dated September 28, 1976.

stance of preparation which indicates a lack of trustworthiness.

In fact, the opposite conclusion is warranted under such facts.

Rule 803(6) does not mandate that there be one and only one custodian of the records. So long as the testifying officer may be classified either as a custodian or other qualified witness, the record may be admitted assuming the other requirements of the rule are met.

* * * * *

An objection to the offered evidence is equally groundless under the contention that the chain of custody of the log book is suspect.

The State need not prove beyond all possible doubt the improbability of tampering; it need only prove that there is a reasonable probability that no tampering occurred. If you, as the presiding Justice of the Peace, are satisfied that there is a reasonable probability that no tampering occurred, then the objection should be overruled and the evidence should be admitted. Tatman v. State, Del.Super., 314 A.2d 417 (1973); Clough v. State, Del.Supr., 295 A.2d 729 (1972). This foundation is normally accomplished if the custodian or other qualified witness can testify as to the standard procedures for the secured storage of the log book and that from an examination of the relevant contents thereof no evidence of tampering appears. Clearly the facts as set forth in the hypothetical demonstrate a reasonable means of ensuring the integrity of the log book. That the testifying witness may not be able to account for every link in the book's chain of custody does not give rise to a presumption of tampering absent any evidence thereof.

NAB:pn

The Honorable Daniel L. Herrmann
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